Supreme Court of the United States

SPENCER S. BULLIS,
Plaintiff in Error,

AGAINST

JAMES R. O'BEIRNE *et al*,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF OF MR. CARY AND MR. MOOT, OF COUNSEL FOR BULLIS, PLAINTIFF IN ERROR

STATEMENT.

Spencer S. Bullis, plaintiff in error, applied to the Special Term of the Supreme Court of New York State, at Buffalo, in July, 1901, pursuant to the Code, Section 1268, to be discharged from a judgment of the Supreme Court of the State of New York, because said Bullis had been adjudicated a bankrupt September 19, 1900. The judgment creditors, who are defendants in error, resisted his discharge, because it was claimed

their judgment against Bullis was for fraud, and, therefore, excepted from the operation of the Bankrupt Act. The New York Court sustained this position, and denied the application "upon the merits." Upon appeal, the Appellate Division, Fourth Department, affirmed this decision, upon the opinion of Spring, J. (p. 218).

Mr. Bullis appealed to the Court of Appeals from the final order denying his application, but that Court affirmed the order without any opinion (p. 209).

ERRORS ASSIGNED.

The errors upon which writ of error of this Court rests are, that the New York Courts refused to give full force and effect to a decree of the Federal Courts, in that they refused to give such effect to a discharge in bankruptcy under the Bankrupt Act of 1898; also that thereby there was called in question the United States Constitution giving Congress the power to make uniform bankrupt laws, and the Bankrupt Act of 1898 thereunder.

QUESTIONS HERE.

The questions that come before this Court are those that arise in the construction of subdivision 2 and subdivision 4 of Section 17 of the Bankrupt Act. Section 17, containing these subdivisions, reads as follows:

> "Sec. 17. DEBTS NOT AFFECTED BY A DISCHARGE.—A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, County, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another;

(3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; *or* (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Was the judgment obtained against Bullis obtained "in actions for frauds, or obtaining property by false pretenses or false representations?"

Our position is that the complaint in the action in which the judgment was rendered shows that action was an action on contract, or *ex contractu*, and Bullis is entitled to have the judgment discharged. If the action was one *ex delicto* he is not entitled to be discharged from it.

There is some ground for arguing that, if the bankrupt law was the same as it was under the Act of 1867, Bullis would not be entitled to a discharge. The present Bankrupt Act, however, is so changed that if a party elects to bring his action on contract, and thus waives the fraud or tort, and accordingly brings his action in such form that the fraud or tort is a mere incident to it, and the action really rests upon contract, expressed or implied, the resulting judgment is subject to discharge under the Bankrupt Act. This is as it should be, for a discharge should not be denied in such cases.

As we shall see, the facts in this case clearly show that the action in which the judgment was obtained was an action to specifically enforce a series of contracts. The Court expressly found plaintiff entitled to judgment enforcing the contracts. The Court awarded judgment of specific performance requiring many thousands of acres of timber lands to be immediately subjected to the lien of a railroad trust mortgage (p. 159.

fol. 634). Judgment was also awarded for $341,745.65, as alternative relief in the equity suit to specifically enforce the contracts (p. 161). The land was not immediately subjected to the railroad trust mortgage by either Bullis or Barse, and so judgment was entered against each for its money value and costs. *That judgment rests upon contract in an action on contract.* As that judgment was affirmed by our Courts, it stands of record against them. Bullis, having since been discharged under the present Bankrupt Act, now seeks to have the judgment discharged of record, pursuant to law.

The Court at the Appellate Division seems not to have kept the distinction between the Act of 1867 and that of 1898 clearly in mind. For instance, it was there said:

> "The statute is to be construed liberally * * * * but that liberality may not be extended to an insolvent to release him from a judgment which was recovered against him by reason of his 'positive fraud and intentional wrong,' "*whatever may have been the form of the action* in which the recovery was had" (p. 225).

The Court here rests its decision upon this Court's words under the Act of 1867?

FACTS.

The judgment roll in O'Beirne vs. Bullis begins at page 1 and continues to page 176. It contains the complaint and the contracts and exhibits upon which it rests. (pp. 1 to 107.) The answers of the various defendants appear (pp. 108 to 119.) The findings of the Court appear (pp. 119 to 160.) The judgment is an equitable one that could not be entered in an action for fraud, deceit, or misappropriating money. It was

entered against two of the defendants in favor of a third defendant appears (pp. 160-161.) This would be impossible in actions for fraud, deceit or misappropriation. The various notices of appeal and judgments of affirmance appear (pp. 162 to 176.) The thousands of pages of testimony upon which the findings were made, and upon which the various appeals turn, are not essential, were not used in the Court below, and are not disclosed in this record.

The first five paragraphs and nine pages of the complaint show, in substance, that Bullis and Barse agreed to mortgage 24 miles of railroad in Pennsylvania and New York, and 30,000 acres of timber land to raise the money to increase the 24 miles of railroad to 46 miles of railroad; also that they agreed to mortgage 16,000 acres of additional timber land to raise additional money to ultimately increase the railroad to a railroad of 70 miles. This mortgage was to secure the payment of $500,000 in bonds, and these bonds were to be sold by Newcombe & Co. to raise the money to build the additional 46 miles of railroad and put rolling stock upon it. This railroad was near Bradford, and was to make its income from hauling timber from the lands mortgaged and lands adjacent thereto. The railroad company was to have a capital stock of $500,000, of which Bullis and Barse were to have $265,000 and Newcombe & Co. $235,000.

The complaint then shows that Bullis and Barse undertook to mortgage the 30,000 acres of land so as to extend the railroad 46 miles, as first provided for, but the charge of the complaint is:

> "Said defendant and each of them falsely and fraudulently pretended and represented to said firm of I. B. Newcombe & Co." (that the land) "was free and clear from all incumbrance, etc" (p. 9, fol. 34).

It will be noted that there is no allegation here that the defendants knowingly or intentionally made these representations. The first contract made is made part of the complaint, and shows there was no intentional fraud, for it reads:

> "The parties (Bullis and Barse) are also the owners of, or control, 30,000 acres of land on which are extensive and valuable tracts of timber." (p. 36, fol. 143).

The complaint then shows that a mortgage was executed upon 30,954.19 acres of land and accepted by the Central Trust Company, of New York, as mortgagee, because Newcombe & Co. and the Trust Company relied upon "the good faith" of Bullis and Barse and "the validity of said apparent conveyance." (Pp. 10 and 11, especially fols. 44 and 45).

The complaint charges that this mortgage was only a "partial performance" of such contracts; that said lands "as to some part thereof," not specified, were owned by others; that the "greater part" were encumbered; that "a large portion * * * * was not timber land;" that "a large portion * * * * is not contingent or adjacent to the line of said railroad" (pp. 13-14, fols. 52, 53, 54, 55 and 56). The main claim was "the failure of the title to a portion of said 30,954.19 acres" (p. 15, fol. 58). The complaint here asks that Bullis and Barse be made to "specifically perform their said undertakings" (p. 15, fol. 59).

The complaint further alleges that $300,000 of the bonds of the company were sold by Newcombe & Co., and were purchased by the plaintiff, "relying upon the said several agreements hereinbefore mentioned" (p. 12, fol 46).

The complaint then clearly shows that Bullis and Barse did not profit by the transaction personally, or convert, or misappropriate money, because it alleges:

"And plaintiff further shows that the proceeds of all of said $300,000 have been expended in the construction of said extensions of said railroad, and in the payment of prior liens and incumbrances upon the property." (P. 12, fol. 47.)

The complaint then shows that the Railroad Company, and a construction company, have no funds to build more railroad, and Bullis and Barse "have refused to comply with the provisions of said several agreements and to place said timber land under the lien of said mortgage." (Pp. 12 and 13, fols. 48 and 50.)

The action was an election to stand on contracts and waive an action for fraud, for it is alleged:

"A great fraud has been committed by said defendants, Bullis and Barse, upon the holders of such outstanding bonds * * * * *unless said defendants, Bullis and Barse, be decreed by this Court to specifically perform their said undertakings and agreements* in that behalf and make good the same by the immediate conveyance * * * * to-wit: 30,000 acres of unincumbered timber land to said Trustee, in accordance with their said undertakings and agreements." (P. 15, fols. 58 to 60).

Would not such a performance in land or money end any charge of fraud? If so, a judgment for such performance by an immediate putting of the timber land under the mortgage, or for its value in money, would be a judgment in equity upon contract.

From this point allegations follow as to the effect of these transactions on the railroad, its credit and its shippers. The allegations go further and show that Bullis and Barse were causing the railroad to construct lines not authorized by the agreements, and threatened to construct still others through the Railroad Company. (Pp. 16, 17 and 18, fols. 64 to 71).

Many of the additional allegations are allegations as to the effect of such transactions upon the Railroad Company, which is alleged to have been controlled by Bullis and Barse (pp. 18 to 22).

The plaintiff showed that he tried to have the Trust Company bring an action in the premises and it refused, and thereupon he brings a class action in equity for himself and his co-bondholders. (Pp. 25-26, fols. 99 to 104).

The demand for the complaint is:

> "Wherefore, plaintiff demands judgment that immediate specific performance * * * * of their said agreements to convey" (be decreed) "or that said defendants pay to *said Trustee, for the security of said bondholders*, such a sum of money as the Court shall ascertain to be the equivalent of the value of said lands." (Pp. 26-27, fols. 104-105).

The contracts of which specific performance was sought are annexed to the complaint as a part of it, and appear from page 30 to page 53. The mortgage is annexed to the complaint as an exhibit and a part of it (pp. 53 to 104). The bond secured by the mortgage is set out as a part of the mortgage (pp. 57 to 61, fols. 227 to 244).

The mortgage reserved to Bullis and his assigns "all lumber, timber, wood, and bark, * * * * oil, * * * * coal, or other minerals." (Pp. 76-77, fols. 304 to 307.)

The complaint did not allege scienter.

There is no allegation that the contracts were entered into with a wrongful *intent*. The recital in the contracts that Bullis and Barse were the *"owners of, or controlled"* 30,000 acres of timber land, in McKean County, Pa., without describing it, is the best possible

evidence set forth in the complaint itself, and not disputed in the complaint, that the contracts were innocent. It is not alleged that it was not then stated that all this land was timber land, but only that it was land "on which are extensive and valuable tracts of timber" (p. 36, fol. 143). The Court found Bullis informed them he did not own some of the "reservations" covered by the mortgage (pp. 146-147, fol. 586). And in the very mortgage executed by Bullis in such "partial" performance, which mortgage is set forth as an exhibit to the complaint, there is a reservation to Bullis "until default by said Railroad Company" of "all lumber, timber, wood, bark, with the right * * * * to enter upon said lands * * * * at any time, for the purpose of cutting down, removing and taking away any and all trees, timber, lumber, wood, and bark, and * * * * all oil, petroleum, gas, coal, or minerals" (p. 77, fol. 305). No "default" had occurred when the Wall Street parties brought their suit for specific performance (p. 156, fol. 622).

With such contracts, and such a mortgage, alleged, in an action to enforce the contracts, insofar as the mortgage was not a fulfillment thereof, is it not apparent a judgment was sought upon contract, and that the fraud pleaded was only incidental to the action?

The position of the defendants in their answers was that the mortgage in question was an honest performance of the contracts (pp. 108 to 118).

The Court found the organization of the railroad, and making of the contracts and the mortgage, the issuance of the bonds and their sale, and the issuance of the stock in the railroad (pp. 119 to 134).

The Court expressly found that the mortgage was made "in apparent and partial performance of the undertakings and contracts" (p. 132, fol. 528).

The Court found that I. B. Newcombe & Co. caused their engineers to examine the lands that were mortgaged before the mortgage was made (pp. 134 and 135, especially fol. 534).

The Court found that the proceeds of the bonds were "duly and *fully* applied to the extinguishment of liens and the construction of the defendants' railroad lines," *although it finds that the proceeds used to extinguish the liens were paid over to Bullis and Barse for that purpose.* (P. 137, fols. 545-546.)

Newcombe & Co. only sold "$260,000 of bonds." (Findings p. 136, fol. 544.) The remaining $40,000 of the $300,000 went to Newcombe & Co., with $100,000 stock for making this sale (p. 51, fol. 201).

From this it is perfectly apparent that Bullis and Barse did not individually commit a deceit or fraud. Newcombe & Co., not Bullis and Barse, were profiting by this deal. The Court found the "plan embraced in the several contracts" was "formulated" by the Wall Street parties, Bullis and Barse consenting thereto (p. 152, fol. 606).

There is an express finding

> "that 1,900 acres thereof * * * * constitute a compliance with the covenants and agreements." (P. 143, fol. 572.)

Other findings show many thousands of acres also were timbered in whole or in part, were owned by Bullis, and wholly, or partially, complied with the contracts (see pp. 141-142-143, and 147-148-149-150-151-152).

The Court expressly finds correspondence from which it appears that Bullis informed them at the time that he did "not own" (some of) "the reservations" covered by the mortgage (pp. 146-147, especially fol. 586). The very contracts alleged in the complaint as the basis of the action, it will be remembered, recite that Bullis and Barse "are also the owners of, *or control*, 30,000

acres of land" (not described) "on which are extensive and valuable tracts of timber" (not all timber land). (P. 36, fol. 143.)

The finding of the Court shows that Bullis was rendered insolvent by these transactions and litigations (p. 145, fol. 580).

The Court found that it was impossible for the defendants to further perform their agreements (p. 157, fol. 625).

The conclusion of the Court was:

> "That the plaintiff has a right to enforce said scheme or agreement and maintain this action for the benefit of himself and all other bondholders" (p. 157, fol. 627).

The Court further determined:

> "I find that the plaintiff is entitled to judgment * * * * for the immediate specific performance by them, the said Bullis and Barse, of their contracts* * * * and that they conveyed, or cause to be conveyed, to said Trust Company for that purpose, 30,000 acres of land, free and clear" (p. 159, fols. 634-635-636).

If defendants did not do this, they were to pay the money at the rate of $18 an acre, instead thereof (pp. 159-160, fols. 636-637).

The judgment entered upon this and other conclusions of law was

> "that said defendants" (Bullis and Barse) pay to the defendant, Central Trust Company of New York, $341,745.65, "for the equal pro rata benefit of the plaintiff and all other holders of the first mortgage bonds." (P. 161, fol. 642.)

Does this statement of facts show an action for fraud or misappropriation? Upon the various appeals, the

New York Courts did not think so, but took an entirely different view of the matter.

THE LAW.

I.

The action against Bullis was upon contract, and not an action for fraud or misappropriation, and, therefore, the discharge in bankruptcy entitles Bullis to have the judgment discharged of record on this application.

In the litigation resulting in the judgment, the New York Courts clearly apprehended and stated, in substance, that the case was one brought for the specific performance of contracts.

The Court awarded a new trial because it held:

> "It has been held in many cases brought to compel the specific performance of contracts that damage may be awarded the plaintiff though specific performance be refused." (Opinion 80 Hun., p. 576. Statements of facts p. 570.)

Upon appeal from that decision the Court of Appeals said:

> "The plaintiff has set forth in his complaint *all the facts constituting a cause of action for specific performance*, and upon it appearing that, that relief could not be granted, he had, at least, the right to a new trial wherein he might establish his claim for *damages sustained by a breach of the covenants and agreements relied upon*" (Opinion 151 N. Y., p. 383).

The defendants, Bullis and Barse, took a new trial instead of appealing. At the beginning of that trial their counsel demanded a jury trial. His theory was that, if there was any cause of action stated, it was a cause of action for fraud, or on contract for damages, and they had a constitutional right to a trial by jury.

This demand was refused, and an exception was taken. This exception was fatal if the action was one for fraud, deceit or misappropriation, but if the action was one on contract for specific performance this exception had no virtue. The question of whether the action was one in fraud for deceit, or an action at law for tort of any kind, like misappropriating moneys, was, therefore, squarely raised. If the complaint presented such an action for the consideration of the Court, a jury trial was a constitutional right. On the other hand, if the cause of action was on contract for specific performance, and the frauds alleged were merely incident to that action, then the Court could properly deny a jury trial, and try it in equity without a jury.

Upon this point the Appellate Division said:

> "We think, therefore, regard being had to the pleadings, that the relief demanded by the plaintiff was purely equitable, and that the refusal to comply, at that stage of the case, with the formal demand for a jury trial, was right."
>
> (2 App. Div., pp. 548-549).

The opinion then proceeds to show that the action was one that could be maintained by a bondholder in equity, for himself and other bondholders. Of course it will be conceded at once that a bondholder cannot maintain such an action at law for damages by deceit or for misappropriating money. A single bondholder cannot maintain a single action for fraud for damages for all bondholders. Each bondholder must bring his own action.

Gray vs. Rothschild, 112 N. Y., 603.

O'Brien vs. Fitzgerald, 6 App. Div., 309, S. C. 150 N. Y., 575.

In the Appellate Division, Morgan J. O'Brien, J., said of the complaint:

> "In effect, the complaint alleged, first that the

defendants Bullis and Barse agreed to convey to the trust company a certain number of acres of unincumbered timber land, to be included in a mortgage as security for the issue of bonds, but instead thereof, and fraudulently and as a compliance with these contracts, they assumed to mortgage land which was not unincumbered, but the greater part of which was subject to mortgages or other liens or incumbrances, for a large amount of which they had no title at all; and, *second,* that the said defendants were interfering with the construction company engaged in constructing the railroad under the agreements, and that said defendants are making certain unauthorized construction of lines of railroad; and, *third,* that the defendant trust company is threatening and is about to execute a release of lands to the defendants Barse and Bullis, and that the plaintiff is without an adequate remedy at law to prevent the same. The relief demanded is a judgment for the specific immediate performance of the agreement to convey, or that the defendants Bullis and Barse be required to pay to the trustee, for the security of the bondholders, such a sum of money as the court shall ascertain to be equivalent to the value of the lands which they had agreed to convey; and, second, an injunction against the trust company and the other defendants to prevent the other acts complained of."

(2 App. Div., p. 548).

On appeal from the last decision of the Court of Appeals, in discussing the demand for a trial by jury the Court of Appeals said:

> "The mode of trial was to be determined *by the cause of action set up in the complaint.* (Untermyer v. Beinhauer, 105 N. Y., 521.) *The complaint alleged a cause of action for the specific*

performance of a contract. Such a suit was properly triable before the court without a jury. Nothing had then appeared to disclose the propriety of a trial in any other manner. The relief demanded was not only specific performance, but also that the appellants be required to pay to the trustee for the security of the bondholders an amount equal to the value of the lands which they had agreed to convey. In other words, the relief demanded in effect was that the defendants should be required to furnish to the trustee substituted security for the payment of the bonds if they could not specifically perform their contract." (158 N. Y., 469).

This view of the complaint was challenged by a motion for a re-argument, with this result:

"Motion for re-argument denied, with costs." (See 158 N. Y., 466; 158 N. Y., 719).

This very brief but emphatic decision settled once for all that counsel for Bullis and Barse must accept the construction put upon the complaint by these Courts, and regard it as simply a complaint setting forth a cause of action in equity for specific performance of contract.

To say because counsel for Bullis and Barse insisted that this was not the true construction of the complaint they may not now avail themselves of these decisions, is a remarkable proposition. It was perfectly proper for counsel to insist then that the complaint set forth a cause of action at law for damages for breach of contract, or a cause of action at law for deceit, and, therefore, they were entitled to the jury trial which they demanded at the beginning of the trial for the purpose of raising this identical question. This question was raised, discussed by counsel and Court, and determined by the Court.

However ambiguous the complaint may be, however two-faced it may be, the Court was bound to construe it as setting forth a cause of action on contract and a cause of action in equity, and not a simple cause of action at law, if such construction was permissible, because the Court was bound to uphold the judgment rendered, if it could fairly do so upon the record. The Court did read the complaint, the prayer for relief at the end of the complaint, and did lay stress on that prayer for relief as showing the construction to be put upon the complaint. The conclusion was thus reached that the complaint could receive the innocent construction which the Court there gave it.

It would be extraordinary if the successful counsel on those appeals could now step into the shoes of defeated counsel and get the Courts to face about and now determine that the action was always an action for fraud or misappropriation of money, wherein a jury trial is a matter of right, no matter how many equitable causes of action are added to it in the complaint.

> *See Davis vs. Morris*, 36 *N. Y.*, 569; *Davison vs. Associates*, 71 *N. Y.*, 333; *and especially Wheelock vs. Lee*, 74 *N. Y.*, 495.

It was determined in the litigation that the cause of action alleged was for specific performance of contracts. In other words, that cause of action necessarily rested upon contract. If the contracts had been performed that was the end of the cause of action. If the contracts had been partly performed to that extent they were out of the case. If they had not been performed in part to that extent they were before the Court. If the plaintiff could show he and the other bondholders did not accept the partial performance as a full performance this would be one step towards a recovery. If the plaintiff could go further and show that after he bought his bonds he discovered that the mortgage made was not such a mortgage as the contracts pro-

vided for in the respects stated, he would go a step further toward a recovery. If he could go still further and show that by their conduct at least Bullis and Barse pretended or represented that the lands which they were mortgaging were such as the contracts called for, he would take the final step to a recovery, according to the decisions rendered.

Actual fraud was not an essential ingredient of the complaint or the proof. It was enough that the plaintiff and the other bondholders had been misled by the conduct of Bullis and Barse.

The action was not unlike an action to reform the mortgage. In such an action it would be sufficient to show that the contracts provided for a better mortgage, and by inadvertance, mistake or fraud, the mortgage provided for was not in fact executed. To the extent that the mortgage executed was not the mortgage provided for, the Courts would reform it if the proof was sufficiently strong and clear. Whatever we may have thought or argued the decisions rendered constrained us to accept this reasoning.

These considerations bring this case squarely within the principle laid down, and squarely within the decision made in Burnham vs. Pidcock, 58 App. Div., 273. In that case Rumsey, J., said.

> "This statute differs from the Bankruptcy Law of 1867, in which it was provided that no debt created by the fraud or embezzlement of the bankrupt * * * * should be discharged. * * * * The judgments which are excepted" (from the present act) "from the effect of a discharge in bankruptcy are, as it is expressed in the statute, judgments for fraud. The phrase means that the fraud is the gravamen of the action in which the judgment is recovered, and that proof of the fraud is essential to the right of recovery. It does not include a judgment in which the right of recovery is based

upon an act which is not essentially fraudulent, although in that action fraud may be incidentally shown. * * * * This action is brought for the conversion of goods. It is not essentially an action for fraud. * * * * It is quite true that in this particular case the learned Court in New Jersey, in determining the motion for a new trial, said that the act of the defendant which made him liable for the conversion was fraudulent, but that statement does not change the nature of the record, nor can the *opinion of the Court* be taken as proof that fraud necessarily lay at the foundation of the action, even if that could be established outside of the record, which we do not think." (58 App. Div., opinion pp. 275-276).

Other experienced judges have taken the same view of the Bankrupt Act of 1898.

In Hargadine-McKittrick Dry Goods Co. vs. Hudson, 111 Fed. 361 (Circuit Court, Eastern District of Mo., Oct. 1901), it is held:

"A judgment rendered on promissory notes cannot be brought within Bankruptcy Act 1898, Section 17a, Clause 2, excepting from the provable debts released by a discharge debts which 'are judgments in actions for frauds' by evidence that the debt was fraudulent in its inception; the creditor being conclusively bound by his election to waive the fraud and sue on the contract."

The Court, Rogers, District J., at page 363, said:

"To say that an action on a promissory note, in the usual and ordinary form, is an action for fraud, is not tenable. Where a note is founded in fraud, two remedies exist. The holder may waive the contract and sue for the fraud, or he may sue upon the note and waive the fraud. The plaintiff in this case chose the latter course, and

took its judgments on the notes. Under this statute it must be bound by that record, and cannot go back of it."

The above case was affirmed by the Circuit Court of Appeals, 122 Fed. 232.

In re Rhutassel, 96 Fed. 597 (District Court, Northern District of Iowa, September, 1899), it is held that

"If the bankrupt obtained a loan of money from the bank by means of false representations as to the amount of property he owned, and gave his promissory not for the amount of the loan, a judgment on such note is not a judgment in an action for fraud or obtaining money by false pretenses or false representations, within the meaning of Bankruptcy Act, Section 17, providing that such judgments shall not be released by a discharge in bankruptcy."

The Court, Shiras, District Judge, says, (p. 599):

"The second clause of this section does not except out from the effect of the discharge claims created by fraud, or by obtaining property by false statements or by willful and malicious injuries to the person or property of another, but does except out judgments rendered upon causes of action of the named nature, and, therefore, to come within the exception it must appear that the creditor holds a judgment which was rendered in an action for fraud, or for obtaining the property by false pretenses, or by false representations, or for willful and malicious injury to the person or property of the creditor. In other words, the judgment rendered, in connection with the pleadings upon which it is based, must establish the fact that the claim sued on and mentioned in the judgment, was created through fraud or by false pretenses, or by willful and malicious injury to the person or property of another. * * * * As

> already stated in the specifications filed in opposition to the petition for a discharge, it is shown that the judgment held by the bank is not based upon any fraud proven to have been committed by the bankrupt, but is founded upon the promissory notes executed by him."

In answer to these decisions counsel below referred the Court to Forsyth vs. Vehmeyer 177 U. S., 177. That case is entirely different from the case at Bar. That case arose under the Bankrupt Act of 1867. It involved a judgment of the State Courts of Illinois rendered in 1871. In that case, although the complaint was defective, the proof clearly disclosed a fraud within the Act of 1867. Under the Act of 1867, it was not essential that the fraud should appear in the complaint if it appeared in the proof.

Because it was not essential that that action should be one for fraud to bar a discharge of the bankrupt under the Act of 1867, upon the facts there disclosed. Peckham, J., there said:

> "A representation as to a fact made *knowingly*, falsely and fraudulently for the purpose of obtaining money from another and by means of which such money is obtained, creates a debt by means of a fraud involving *moral turpitude* and *intentional wrong*." (Opinion, p. 182.)

In the opinion of Justice Rumsey, from which we have quoted, it is conceded that such was the law under the Act of 1867. Our State Courts are continually making decisions under the present Bankrupt Act that follow the opinion of Rumsey, J., in Burnham vs. Pidcock, 58 App. Div. 273. (See Collins vs. McWalters, 35 Misc., 650.)

As to misappropriating money, we regard it so perfectly clear that Bullis was *not acting in a fiduciary capacity*, and did not misappropriate money, either on

the allegations of the complaint or the finding of the Court, and that the money realized on the bonds was "fully" expended in building railroad and discharging liens, that we will not discuss or argue it. The statute itself is in the alternative and the cases provided for in subdivision 4 are entirely different from those provided for in subdivision 2. This being so, we read subdivision 4 by itself and find it in substance providing for defalcation, conversion, or misappropriation of funds to one's own use *while one is acting as an officer or agent of some principal.* As no such case was alleged, proved or found, it is unnecessary to discuss the law upon that point. The money having been "duly and fully applied" to build railroad and pay liens (findings of fact, p. 137, folio 545) there was no misappropriation, conversion or embezzlement by an officer or agent of the money of the principal. The officer did not wrongfully take or use the money of the principal, hence there is no ground upon which to claim Bullis was shown guilty of any "defalcation." The Court below held with us upon this point. (Pp. 227-8.)

II.

The New York Courts erred in overlooking the broad distinction between actions ex delicto and actions ex contractu, and in the consequent conclusion that "the respondent is not concluded because he elected to proceed by a suit in equity;" also in its conclusion that "the back-bone of the action, whether viewed strictly as one in equity or for damages in lieu of equitable relief to compensate the bondholders for the misconduct of the defendants, was the fraud of the latter" (pp. 224-227).

The action was upon the contracts. Without the contracts there was no obligation to put up land. Upon the obligation of the contracts the Courts rested their judgment that money should be put up to the extent that contiguous timber land of good quantity and title was not mortgaged. The contracts created a contract

obligation to mortgage, and because that obligation was only partly fulfilled according to the finding of the Court, the judgment was that the contract be fully performed. The obligation rested in contracts, the action was to inforce this obligation created by the contracts, and the judgment merely enforced this obligation of those contracts. In its essence the judgment is one of money damages to literally *fulfill* a partial breach of the contracts. The motive, or reason, for the partial breach of contracts became unimportant because the suit was in equity. Mutual mistake, or the inability to perform, that was proved and found, would still leave the contracts partially unperformed, as they were read and construed by the Court. The obligation of those contracts would have required the same judgment as to the part not performed, whether nonperformance was due to fraud, mistake, or financial inability to perform.

Authorities are not cited by the Court in New York to sustain either the conclusion concerning the effect of the plaintiff's election to proceed in equity, or the Court's conclusion that fraud is the back-bone of the action. To sustain the opinion below, two cases are cited arising under the old Bankrupt Law, a law entirely different from the present statute on this point. Having cited those cases, the learned Judge says:

"In the authorities which I have examined no stress is laid upon the form of the action." (P. 225 fol. 806.)

This is correct because under the old Bankrupt Act the form of the action was of no consequence, the character of the judgment was of no consequence; the primary thing was the character of the obligation. But under the present Bankrupt Act this is changed. Now, the character of the obligation is of no consequence, but the vital thing is whether or not we have "judgments in *actions for frauds.*"

Under the old Act, the thing provided was that no

"debt" created by fraud should be discharged. Now, the character of the debt is unimportant, the character of the "action" resulting in the judgment, is the important thing. For this reason we must look sharply at the difference between the language used in the old and new Bankrupt Law. Certainly, Congress did not depart from the language of the old Act without an intention to change the law.

This very point has been up, and the difference between the two statutes resulted in the discharge of a judgment under the present Act, where it could not have been discharged under the old Act, as appears from the opinion of Rumsey, J., in the case, Burnham vs. Pidcock, 58, App. Div., 275-276.

This difference in the Acts makes the cases under the old Act inapplicable here. This difference between the Acts makes the character of the action here of vital importance. The language used in the present Act undoubtedly has reference to the distinction between actions *ex delicto* and actions *ex contractu*.

A strong argument can be made to show that the language of the present Act was used for the purpose of permitting the discharge of all judgments not actually recovered in common law actions for deceit or fraud. It is not necessary, however, to draw the line so close in this case. It is enough here if the action in which the judgment was rendered was an action *ex contractu* and not an action *ex delictu*. The Court below held that a distinction between these two classes of actions is unimportant. The Court below said: "No stress is laid on the form of the action." That was so under the Act of 1867. The Court below said again: "Whatever may have been the form of the action." (P. 225.) But it was error to apply that principle of the Act of 1867 to the Act of 1898 changed to avoid such a result. The Act was drawn by lawyers from all over the country, was agreed upon by lawyers

representing commercial bodies from all over the country, and it represents the common understanding of lawyers from all over the country. Some of these lawyers came from Code States, and some from common law States. They used words, therefore, that would describe in plain English those cases in which a bankrupt ought not to be discharged.

When we examined the complaint in the action now being considered, however, we find all allegations of intent, and all allegations of scienter omitted. This was because such allegations might make the action one *ex delicto* and result in plaintiff's defeat (Peo. vs. Dennison, 80 N. Y., 656, 84 N. Y., 272; Banks vs. Memphis, 84 N. Y.,428). Their absence would enable him to recover on contract and give him the benefit of evidence that would move a court of equity where it would be insufficient in law. Upon examining it further, we find that the first part of the complaint alleges innocent contracts to build railroads, issue stock and bonds thereon, and secure the payment thereof by a mortgage on railroads, and contiguous lands. The theory of the complaint is that these contracts are honest, innocent, lawful, proper contracts. The complaint, and the contracts themselves, clearly show the *promissory* character of the contracts. Until something was done under the contracts, nobody could be defrauded by them. The contracts look to the future, are promises in writing to do something in the future. They were contracts under seal, and, therefore, strangers to them could not maintain an action at law upon them. They were made, however, for the benefit of brokers and their clients who should buy stock and bonds that were to be produced by, or through, the fulfillment of the contracts. Stock and bonds having been issued, and a mortgage having been made to secure the bonds, the bondholders became interested, as the beneficiaries of the mortgage made in fulfillment of the contracts. One of those bondholders came into court for himself

and all others who saw fit to join with him, and set forth a cause of action in equity. That cause of action was that the contract had only been partly performed. In fact, it was claimed the performance was fictitious, inasmuch as the lands mortgaged were not of the quality provided for by the contracts. It was a serious objection to this position that the very first contract itself provided:

> "The parties are also the owners of, or control, thirty thousand acres of land, on which are extensive and valuable tracts of timber." (Contract, p. 36, fol. 143.)

The Court will notice there is nothing in the language just quoted about having good title, or about the land being free from incumbrances, or about the land being all timbered land. Of course it became a serious question, in an action for specific performance brought on such a contract, whether the Court could take oral testimony of oral statements to put into this contract covenants concerning the title and the incumbrances, and the amount and character of the timber. Strong authorities may be cited to show that this could not be done.

> *Tuthill vs. Wilson*, 90 *N. Y.*, 427.
> *McConihe vs. Fales*, 107 *N. Y.*, 408, *and cases.*
> *Van Werl vs. Winston*, 115, *U. S.*, 228.

This was a strong point because specific lands are not described in the contracts. Why this consideration was not fatal in the action was never made clear.

The Court then took a different view of the case. It thought that so far as the mortgage given was not such a mortgage as should have been given, it could be treated as not fulfilling the contracts. It was decided a court of equity could compel the parties to the contracts to perform the contracts, so far as they had

not been performed, or to put money into the hands of the trustee to take the place of the lands that should have been put under the mortgage. In other words, there was a breach of the contracts; or at least the contracts were still in part unperformed.

Of course it is not intended that this Court could have rendered such a judgment in any kind of action *ex delicto*. In an action *ex delicto*, whatever its form, the relief granted would have been relief in favor of each individual damaged, for the damages that individual had suffered. But in an action *ex contractu* to have contracts specifically performed by forcing the parties to perform them by the decree of a court of equity, we have an entirely different case. Then the court could render a judgment in favor of one defendant against the other; an unheard-of thing in an action *ex delicto*. In such a case we contend that the fraud alleged is not the cause of action. The cause of action is one to enforce the contracts so far as they have not been performed. It is utterly immaterial whether the contracts were not performed because the parties could not perform them, or because the parties would not perform them, or because the parties made a mistake in performing them, or because the parties fraudulently substituted a fictitious performance for a real one. The vital thing in such a case is the non-performance; the immaterial thing is the reason for the non-performance. It is immaterial what reason the Court gave for holding that a court of equity had power to cause the contracts to be performed. If they had not been performed a court of equity could order them specifically performed, whether their non-performance was due to mistake, unwillingness or misconduct. The decree ordering their performance is not important as to its form. Whether that decree be a decree ordering land put under the mortgage, or ordering incumbrances discharged, or ordering money into the hands of a trustee instead of land, is entirely immaterial. The material

thing is that the decree is a decree of the Court ordering the completion of the performance of the contracts. Before the decree was rendered, the parties could be compelled to perform because they had not performed, and why they had not performed was legally immaterial. After the decree was rendered, the parties interested therein could invoke the process of the Court to enforce the judgment into which contracts merged. As the judgment of the Court was for money to be paid the trustee, the entirely adequate process awarded by law to enforce the judgment is an execution. The complaint demanded a decree that the contract be performed, and the Court gave such a judgment.

It was not suggested or claimed that an execution could be enforced against the person. It is not suggested or claimed that any execution ever has been issued against the person. If the claim now made is sound, an execution can be issued against the person.

If an execution can be issued against the person, then we have this peculiar case before this Court for adjudication: An action is brought to specifically perform contracts. When the trial of that action is commenced, the defendants insist that they are entitled to a jury trial under the Constitution. The plaintiffs dispute this claim, and the Court rules to the contrary, and the defendants except. Upon appeal, that exception is presented to this Court, and this Court rules that as the action was one in equity for the specific performance of contracts, the defendants were not entitled to a jury trial. No case is cited in which a body execution has ever been issued to enforce a judgment in such an action. No case is cited in which any court has ever held such an action to be an action for fraud. The absence of any charge in the complaint that the parties intended to defraud, or knowingly made false representations, would be fatal to such a claim. And yet the Court below, for the reasons given, has held that

Mr. Bullis cannot be discharged from this judgment because it is one in an action for fraud. It is not an action for fraud. It is not an action in tort. It is not an action *ex delicto*. It is an action on contract; an action *ex contractu*.

Do the cases, which the Court did not notice or comment on, conflict with the conclusions reached by the Court below? Is there any peculiar practice in New York upon this subject? The cases answer No. Let us consider some of them.

CASES.

A. *Ex contractu* or *ex delicto*.

In Byxbie vs. Wood, 24 N. Y., 607, 611, it is said:

> "What valid objection is there to treating these words ('fraudulently and by deceit') as mere inducement, containing a statement of the facts which show that Marvine's payment was not a voluntary one, with knowledge of the facts, and that, therefore, he was entitled to sue to recover back the money, and thus anticipating a defense?"

In Ledwich vs. McKim, 53 N. Y., 307, it is said in the opinion (p. 316):

> "The complaint avers the facts which were proven and which make out a cause of action in contract. The presence of the averment as to the representations, even were they averred to have been false and fraudulent, do not make the action one *ex delicto*."

In Segelken vs. Meyer, 94 N. Y., 473, we have a leading case as to the distinction between actions *ex contractu* and actions *ex delicto*, with an opinion by Rapallo, J. The Court said (p. 484):

> "This is clearly a cause of action *ex contractu* * * * * the plaintiff does not by adding to

the allegation that the defendant had refused to pay over the money due—an assertion that he has converted it to his own use—convert the action into one for a tort. The addition is mere surplusage under the circumstances. * * * * The action must, therefore, be treated as in form *ex contractu.*"

If it is claimed this is an action *ex delicto,* we find wanting two vital allegations. In the leading case on the subject, it is said that the essentials of an action *ex delicto* for false representations are "representation, falsity, scienter, deception and injury."

Brackett vs. Griswold, 112 N. Y., 454, *opinion* 467.

Of course, if the intent to deceive is necessary in such an action, it must be alleged in the complaint or the action will not be one for fraud within the Bankrupt Act.

How absolutely essential knowledge and guilty intent are to such actions where false representations are claimed to have been made, will be seen by examining the various cases in which the representations made in a prospectus by a corporation, although false, were not shown to have been knowingly and intentionally made by the parties signing the prospectus. Again and again the jury gave a verdict in favor of the plaintiff, but again and again the Court of Appeals reversed the judgment thereon for want of any proof of knowledge or fraudulent intent.

(See Arthur vs. Griswold in various forms, as reported in 55 N. Y., 400; 68 N. Y., 294; 80 N. Y., 128; 89 N. Y., 112; 112 N. Y., 454, and 128 N. Y., 644-648.)

If the action is in equity, a finding of fraud is immaterial and not conclusive. A head note of Lorillard

vs. Clyde, 99 N. Y., 196, correctly states that case as follows:

> "Where, in an equity action, questions of fraud are submitted to and passed upon by a jury, which have no relevancy to the issues presented by the pleadings, and are not involved in the judgment, they are not conclusive upon the parties in a subsequent action."

The Court pertinently said (p. 200):

> "It is the judgment of the Court and not the findings of the jury which bind the parties. The adjudication is not in the verdict but in the judgment adopted by the Court. (Freeman on Judgments, Sections 251, 257, 271.)"

For these reasons a finding does not change the character of the action. The (present) Bankrupt Act lays the stress on the character of the action, and the complaint, not the findings, necessarily determines the character of the action. The action brought was one in equity to enforce contracts, and, as a necessary incident, to ignore, or reform, the mortgage made in performance of the contracts. In effect, it was necessary to ignore, or reform, the mortgage that the contracts might be performed. When this action was brought, at the most the plaintiff had an option to bring an action at law for the damages which he alone had suffered, an action to recover back money paid over on the mistaken notion that it was paid over under a mortgage that fulfilled the contracts, or an action in equity for himself and all others to specifically perform the contracts.

Gould vs. Cayuga Co. National Bank, 86 *N. Y.*, 75.

Having obtained "substantial benefits" by "partial performance" he could not retain them and rescind, but he had to seek full performance or damages for the partial breach. Kaufman vs. Reader, 108 Fed., 171 S. C., 54 L. R. A., 247 and 252 and cases cited.

Without the contracts no action at law for fraud could have been maintained. This is so because the bonds and mortgage would have been the only contracts, and their covenants alone would have furnished the only personal obligations of the parties.

As Bullis was not personally a party to any personal covenants in either bonds or mortgage, the plaintiff, who bought bonds relying on the mortgage being on good, clear timber land, could not hold Bullis for his money. The Trustee received plaintiff's money, paid it to the Railroad Company, and so plaintiff had to get better security or get his money back. He alleged the Railroad Company was insolvent, so he could not get it back, and then brought his equity action to get a better security, either land or money.

Having thus elected to bring the action in equity, the distinction between action *ex contractu* and actions *ex delicto* becomes very important. Whether he could have brought an action for fraud or not he elected to waive it. The Gould case was an action for fraud, and the Court said (86 N. Y., 83-84):

> "If this had been an action in equity to rescind the contract, the court could have done equity between the parties, and so moulded its judgment as to accomplish that result. It could, if needful, have brought into the litigation matters pertaining to the Trust created by Starin for plaintiff's benefit, and to that end could have ordered that Starin and the Trustee be made parties. This action was brought as an action at law, no mention being made in the complaint of the compromise agreement or of the $25,000 paid to the plaintiff. A purely legal defense was set up; it was tried as an action at law, and no motion was made to convert it into an equity action."

> "It is idle to say that the distinction between legal and equitable actions has been wiped out by

the modern practice. It is true that all actions must be commenced in the same way; that in every form of action the facts constituting the cause of action or defense must be truly stated; that fictions in pleadings have been abolished, and that both kinds of actions are triable in the same courts. *But the distinction between legal and equitable actions is as fundamental as that* between actions *ex contractu* and *ex delicto*, and no legislative fiat can wipe it out. (Reubens vs. Joel, 13 N. Y., 488; Goulet vs. Asseler, 22 id. 225.) At any rate, the difference between an action to rescind a contract and one brought, not to rescind it, but based upon the theory that it has already been rescinded, is as broad as a gulf. They depend upon different principles and require different judgments."

B. *Election.*

Having elected to bring an action in equity for equitable relief—in other words, an action *ex contractu* instead of an action at law for damages and for fraud—in other words, an action *ex delicto*—the election so made fixes the character of the action brought by plaintiff, and amounts to a waiver of any claim to a judgment for fraud. The question is not what kind of an action could he have brought, but what kind of action did he bring? By electing to bring an action upon contract instead of an action *ex delicto;* an action in equity instead of an action at law, the parties necessarily waived all the remedies and rights that would have attached to a judgment in an action *ex delicto.*

The principle of these cases is thus stated in the headnote to Madge vs. Puig, 71 N. Y., 608:

"Where a plaintiff unites in his complaint two causes of action, one of which is bailable, and the other not, be waives his right to bail as to both, and an order of arrest cannot be sustained."

Neftel vs. Lighthouse, 77 N. Y., 96, is a striking case holding that, in a case like this, there is "a complete cause of action on contract, hence the court could properly disregard the allegations of fraud." (Opinion, p. 99.)

Goodwin vs. Griffis, 88 N. Y., holds: "If the cause of action is doubtful or ambiguous every intendment is in favor of constraining it as being in the nature of an action *ex contractu*." (Opinion, pp. 638 and 639.)

In Rothschild vs. Mack, 115 N. Y., 1, the opinion starts off by saying *"a gross fraud was perpetrated."* The head-note states the case correctly as follows:

> "An action in the nature of an action of assumpsit lies against one who has obtained money from another by a fraud, and such claim is a proper subject of an offset in an action brought by the party against whom it exists; the tort may be waived and the action, or set-off, founded on an implied promise to return the money wrongfully obtained."

In the opinion Peckham, J., says: "The cause of action, the tort being waived, was on contract" (p. 8). It was not claimed it was waived otherwise than by bringing that action in equity for a set-off because of the fraud; hence that case is clearly in point here. The intent to waive the fraud is clearly found here in this language of the complaint: *"A great fraud has been committed * * * * unless said defendants, Bullis and Barse, be decreed by this Court to specifically perform their said undertakings and agreements."* (P. 15, fols. 58 to 60.)

The principle contended for here was applied in People vs. Wood, 121 N. Y., 522, where it is said of the complaint in that action (pp. 528-529):

> "It alleges all of the facts necessary to constitute a good cause of action in assumpsit for money had

and received for the use and benefit of its owners, and such actions have been designated from time immemorial in law as actions *ex contractu*.

"The allegations in the complaint that the defendant obtained such moneys upon false, fictitious, excessive and fraudulent charges and accounts, constitute no part of the statement of the cause of action, and do not necessarily render the action in tort, as they are used for the simple purpose of obviating the effect of an audit by the board of supervisors and to anticipate a possible objection which might be taken by the defendant. (Byxbie vs. Wood, *supra*, Neftel vs. Lightstone, 77 N. Y., 96.) Even if, upon the facts alleged, a cause of action in tort might be spelled out from the language of the complaint, it is established by ample authority that it is still optional with the injured party to waive the tort and rely upon assumpsit, if he chooses to do so where the facts authorize such an action. (Goodwin vs. Griffis, 88 N. Y., 629; Rothschild vs. Mack, 115 id., 1.) The right of the plaintiffs to waive their cause of action in tort and found their right to recover upon contract, whether express or implied, is unquestionable, and there is no power either with the defendant or in the court to compel them to proceed upon the tort."

And in Terry vs. Munger, 121 N. Y., 161, the question was up as to whether a party had elected to waive the tort and proceed on contract for goods obtained by false pretenses, and it was held that by bringing an action against some of the parties for the purchase price of the goods, the party had elected to waive the tort, and thereby the sale was affirmed and the title to the property passed to the purchaser.

Numerous authorities are cited to illustrate and sustain the opinion of Peckham, J., in that case. There

from it follows that in bringing this action to enforce these contracts, the parties necessarily elected to purge the non-performance thereof from any fraud connected therewith by substituting a judgment for money in place of the parts of the contracts not performed. Deeming such a judgment as that sued for more desirable than one for damages in an action *ex delicto*, the parties elected to and did sue in equity, *ex contractu*, therefor, and by that election they are bound.

C. *"Promissory" contracts.*

The character of the contracts on which the suit was brought necessarily makes those contracts innocent. They describe no land; they promise, in the future, to identify and mortgage land. Their freedom from covenants as to incumbrances, title or timber, has the same effect. The Court would not compel a purchaser to take property where the title was not good because the contract was silent about it, unless the contract clearly showed that the parties contracted with reference to the title as it was. But if it clearly appeared that the parties took the title with the understanding it was good, when such was not the fact, whether this was done through innocence or fraud, a court of equity could undo the transaction and make it good by a money judgment, or by decreeing other adequate relief.

That fraud in the subsequent transactions of the parties does not vitiate an innocent contract appears from Chesterman vs. Gardner, 5 Johns. Ch., 29, where $1,000 was paid on an executory contract which was not performed, because the land turned out not to be free from incumbrances in accordance with the contract. It was held that the statement that $1,000 was paid because the party fraudulently represented that he was the owner of the premises was insufficient to sustain an order of arrest.

Oatley vs. Lewin, 47 *Barb.*, 18.

In Francis vs. Railway, 17 Abb., N. C. 1, the head-note correctly states the turning point of the case as follows:

> "The principle re-stated that representations as to future events cannot be a constituent of fraud in fact."

And finally, Finch, J., clinches the matter and brings it home to this very case by his statement of the law in Sparman vs. Keim, 83 N. Y., 245, as follows:

> "Those alleged were only that the artistic decorating business into which the plaintiff was invited to put his capital 'would yield large profits,' and the only representation proved was 'that it was a good paying business.' The representations were *promissory* and matter of opinion, and had respect to the developments of the future. There was nothing in them on which to found an action *ex delicto*." (Opinion, p. 249.)

When O'Beirne brought his action his counsel knew he could not maintain an action *ex delicto* against Bullis, because it was not alleged, or found, O'Beirne, a subsequent bondholder, ever saw, or communicated with Bullis before buying his bonds. His only action, therefore, was the one in equity on contract, which he elected to bring and brought. How can he be treated now as if that action was one at law, not in equity, an action *ex delicto*, not an action *ex contractu?* The Federal decisions are to the same effect. This is so well known that a few only will be referred to for the convenience of the Court.

D. *Federal rule the same.*

In a recent case before Mr. Justice Brewer and able associates, we have a case in point.

There the plaintiff loaned money upon real estate. These loans were made by local directors, and were

not to exceed 50 per cent. of the real estate value. The defendants became such local directors, knowing all this, and that they might be in position to pass such loans, and then proceeded to appraise land at $900, worth only $100, and to pass a loan of $450 thereon, which loan was made accordingly by plaintiff. The plaintiff foreclosed its mortgage at an expense for foreclosure and taxes exceeding the value of the land. There were other similar loans. The facts in detail were thereafter alleged and the plaintiff sought judgment thereon against defendants for its loss. No intent to defraud was alleged in the complaint. The defendants demurred upon the ground, really, that the facts showed a fraud was alleged, and, therefore, the action was barred by the Kansas statute of limitations. The Court said:

> "The question presented, then, is whether this is an action *ex contractu* or *ex delicto*, and that question must be answered by the amended petition. * * * * *This is not, in our judgment, an 'action for relief on the ground of fraud.'* It may be that the facts strongly indicate—perhaps they are sufficient to warrant the legal inference—that fraud was committed. This is very frequently the case when a covenant is broken, but one who breaks his agreement cannot deprive the other party to the contract of his right of action for a breach by committing a breach and a fraud at the same time. In such a case a party has a right of action for relief on the ground that the contract is broken, and a right of action for relief on the ground of fraud, and the wrong-doer has not, but the injured party has, *the choice of remedies*. He may bring his action for damages for the fraud, or he may waive the tort and sue on the contract. Pom. Code Rem., sections 567-571."

Mo. S. & L. vs. Rice, ~~113~~ 84 *Fed.* 131-132-134.

Apply that decision here. O'Beirne was a bondholder. If fraud had resulted in his buying bonds as secured, when they were not secured, he had his right of action at law for fraud, but such an action he did not bring. If he was a party to the contracts, or became such by assignment, he could sue at law for damages for their breach, even if that breach was produced by fraud, if the fraud was only incidentally pleaded to show the breach, but such an action he did not bring. Or he could allege the "partial" performance of the contract, because mistake, or fraud, prevented the complete performance, and then ask, as here, for specific performance of contract, and this action he brought. But in such a case either action brought is an election to waive the others; for even bringing an action at law for damages, where only nominal damages are recovered, is held to be a bar to an action in equity for specific performance.

Slaughter vs. Co. F. &c., 119 *Fed.* 588.

This is there said to be

> "not because the remedies are inconsistent. On the contrary, they are alternative. *Both are in affirmance of the contract*, and, indeed, remedy in both forms might be sought in one and the same action. Connihan vs. Thompson, 111 Mass., 270. * * * * If he sues at law for a breach and damages* * * * recovering them, whether the amount be large or small, bars him from insisting thereafter in equity that defendant perform the contract." (Op. 119, Fed. 589.)

So the action for specific performance in equity is "in affirmance of the contract?" It is an action of the broadest character for relief founded upon the executory obligation of the contract as yet unfulfilled. Whether the judgment rendered in such an action be for land, or money, can it be doubted that judgment is

upon contract? Does it absorb the executory part of the contract? Is not the executory part of such contract merged in such judgment? Bringing such an action for such relief is a "choice of remedies" that is an election to treat any fraud alleged as merely the incident of the contract, the contract, so far as it is unfulfilled, being the main, substantive, and vital thing in the action. The judgment that merges such contract must be a judgment upon contract, not one for fraud.

III.

The Court below should have held Bullis was entitled to his discharge.

The Court below was mislead by the fraud cry of counsel.

The Court apparently lost sight of the fact that there was a finding that Bullis was rendered bankrupt by the transactions in question long before the judgment was rendered. The findings show that he owned or controlled three small railroads, thousands of acres of timber land, considered himself worth $150,000, and that he entered into these contracts and mortgaged his railroads and his timber lands in performance of them. They show that every dollar obtained was expended in paying off liens upon the railroad, or building railroad (p. 137, fol. 545; p. 145, fol. 578). They show that Bullis united in a guarantee of dividends on part of the stock, and gave to Newcombe & Co., and their associates, as commissions, and to interest them, nearly one-half of the stock, including that on which dividends were guaranteed by him (p. 145, fols. 579-580). They show that the parties knew he did not own the timber on much of this land at the time, and that the mortgage was altered for this reason (p. 147, fol. 586; pp. 149 to 151, fols. 596-603). They show that this land and these contracts were got up by Newcombe & Co., and their associates (p. 152, fol. 607).

The natural result of such circumstances was that Bullis was stripped of his property, the foreclosure of this mortgage was commenced at the instance of the bondholders (p. 156, ll.d. 6/21), and Bullis was rendered insolvent before the O'Beirne judgment was rendered (p. 155, ll.d. 5/10).

With such facts found in the record, it does seem unjust to deny this man his discharge in bankruptcy because in an equity suit he was ordered to perform contracts that he had already performed to the extent made possible by all the property he possessed. The contracts having been innocently made, any debt growing out of them, by judgment or otherwise, would be an innocent debt, and one that could be discharged, even under the old Bankrupt Act.

In Bowes re. Bennett, 21 Man., 3/31, 2/32, it is expressly held in a case of this character:

> "If the contract was fair and honest when made, although the debtor subsequently may be guilty of fraudulent conduct in respect of it, yet such conduct does not cut off the benefit of the discharge."

And (p. 5/21):

> "We conclude that the declaration does not set out a cause of action from which the defendants were not released by their discharge in bankruptcy."

So here, if the mortgage is treated in part as fraudulent, when it is disregarded and treated as a nullity, what we have left is the innocent part of the mortgage and the innocent contracts and the action upon them. Now, when the Court finds the defendants cannot get the fee of the land under the mortgage as agreed in the contracts, it orders the defendants to get the money value of the lands under the mortgage in fulfillment of the contracts. Surely, the contracts are innocent and honest, and the judgment upon the contracts is mon-

sent and honest. Is it not equally clear that the judgment upon the contracts disregards all intermediate transactions and purges the case thereof? Can it be possible that the parties can sue upon their contracts, treat part of the mortgages as a nullity, and have a money judgment, and then that they may also prevent the discharge of the judgment resting upon an invalid contract in its foundation? Neither the old Bankrupt Act nor the present Bankrupt Act contemplate such a result.

This case is controlled in principle by Sage v. Lamb, 69 N. Y., 448.

There the fraud alleged was that the plaintiffs were induced to give acceptances to be secured by chattel mortgage, by means of false representations as to a special indebtedness represented to be due to one Sargent. The Bankrupt Act having been paid on these acceptances, an action was brought thereon. The defendants treated their discharge in bankruptcy under the old Bankrupt Act as a defense. The Court left the case to the jury on the issue of fraud, and the jury found with the plaintiff. Rapallo, J., wrote the opinion on appeal, and, among other things, said (p. 450):

> "In charging the jury, the learned judge also provided in the event that it was unable to agree upon other questions than those arising upon the alleged representations, made before the execution of either of the mortgages as to the amount of the indebtedness of the defendants to Sargent & Co. [illegible] or other and subsequent amounts. To the error upon the part of the plaintiffs was formally, this was apparently the only point upon which a verdict could upon false representations could rest. The other representations appear to have been promissory in their character, relating to the future, and not to existing facts. The learned judge

therefore confined himself in his charge to the jury to instructing them that if the representation that the indebtedness of the defendants to Richards & Collins, on Special account, was only $10,000, was made and was untrue, and the plaintiffs relied upon it, and gave the credit upon the faith of it, and had been thereby damaged, they were entitled to a verdict.

"This charge omitted the element usually necessary to sustain an action for fraudulent representations, viz.: that the representation was known by the party making it to be false, and was made with intent to deceive."

Again (p. 432):

"In the cases of Meyer vs. Amidon (45 N. Y., 169), and Oberlander vs. Spiess (id. 175), the general rule was recognized, that an action for fraudulent representations cannot be maintained without proof that the defendant believed, or had reason to believe, at the time when he made the representations that they were false, and, consequently, that they were fraudulently made."

Accordingly, the judgment of the General Term was affirmed, and the effect of the decision was to hold that the discharge in bankruptcy discharged the defendants.

Here we have two cases applying the very principle for which we contend. In each case, the fact that the contract was innocent was the controlling factor, notwithstanding that each case was in form an action at law for damages for deceit and fraud. If the innocent character of the contract was so controlling under the old Bankrupt Act, in actions at law for damages for fraud, is not the present Bankrupt Act clearly applicable to judgments enforcing the specific performance of contracts, no matter what the facts, or what the reason inducing the Court to order their performance? Are not

such judgments in truth judgments in actions upon contract?

The policy of the law favors the construction for which we contend. It is the object of bankrupt acts to free men from liabilities, that they may again enter commercial life untrammeled. There is no reason for denying a man a discharge in a case of this character, where the parties opposing it have waived the alleged fraud by bringing their actions upon contract for performance of those contracts. If such parties are willing to take a judgment for money only for performance of the contract, we cannot see why they are not in precisely the same position that they would be if they had waived the tort and sued for the purchase price of goods obtained by false representations. We cannot see why they are not in the same position that they would be if they had alleged the fraudulent character of representations upon which an extension of time had been obtained, and, proving those fraudulent representations, had obtained a judgment upon their obligations, because they were able to ignore the extension because of the fraud through which it was obtained.

Recent cases observe the distinction between actions *ex contractu* and *ex delicto*. Breach of promise with seduction added does not result in a judgment that cannot be discharged, because the basis of the action is the breach of the contract to marry. Disler vs. McCauley, 66 App. Div., 42. But an action for criminal conversation, or for seduction alone, will result in a judgment that is not discharged by bankruptcy. Colwell vs. Tinker, 169 N. Y., 531-535. Even under the old act, bringing an action might show there was no moral turpitude. O'Neil vs. Clark, 95 U. S., 704.

Illustrations might be multiplied, but this case comes back to the proposition that the parties opposing the discharge of Bullis elected to waive the alleged fraud and bring an action in equity for the performance of the

contracts. They thus rested their action on contract. Without the contracts they had no cause of action. With the contracts out they were under no obligation to put up land, or money in the place of land. With the contracts in, the real question was, had they been fully performed? The non-preference in part gave rise to the right to enforce the part not performed. The judgment is *perform the contracts so far as they are not performed.* Kaufman vs. Reader, 108 Fed., 171; S. C. 54, L. R. A. 247, 252 and cases cited.

Instead of obtaining a judgment in an action for fraud, they obtained a judgment in an action to have contracts specifically performed. Having thus obtained a judgment for the performance of their contracts, which does not differ in substance from a judgment ordering a man to pay the amount agreed to be paid upon bonds or mortgages, or notes, or other obligations for payment of money, we cannot see why the judgment is not discharged under the present Bankrupt Act. The intent of that act is that if parties do not bring an action *ex delicto*, for fraud, and obtain a judgment therefor, they cannot prevent the discharge of a bankrupt. If they bring an action *ex contractu*, when they might have brought one *ex delicto*, the fact that it is shown, or held, that the facts were such as would have sustained an action *ex delicto* is immaterial under the present Bankrupt Act. Under the old act the stress was on the character of the obligation, but now it is on the character of the action. But here the original obligation is found in innocent executory contracts, and the action is to perform the parts not performed; hence Bullis is entitled to his discharge, for he is entitled to it if we look at the obligation under the old law, or the action under the present law. Even if there was fraud, bringing an action in equity on contract, express or implied, for equitable relief, waives the fraud, and results in a simple action "on contract." Rothschild vs. Mack, 115 N. Y., 1-8.

The judgment appealed from should be reversed, and this case should be remitted to the New York Courts, with instructions to grant the motion of the appellant, Bullis, that he be discharged under the Bankrupt Act.

It is equity that promissory contracts that have rendered Bullis a bankrupt should not prevent his discharge because the courts have ordered them performed in an action in equity upon the contracts.

Respectfully submitted,

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